

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KOUNTA OUSMANE,

Plaintiff,

v.

IMMIGRATION AND CUSTOMS
ENFORCEMENT,

Defendant.

No. C11-0344 BHS/KLS

REPORT AND RECOMMENDATION
Noted For: June 10, 2011

This action has been referred to Magistrate Judge Karen L. Strombom pursuant to 28 U.S.C. § 636(b)(1), and Local Rules MJR 3 and 4. Plaintiff is a detainee at the Northwest Detention Center (NWDC), a federal immigration detention facility administered under contract by The GEO Group, Inc.¹ Plaintiff presented to this Court for filing a civil rights complaint under 42 U.S.C § 1983, which the Court construes as a civil rights action brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), because Plaintiff is seeking to proceed against federal actors. After review of the complaint, Plaintiff was directed to amend or to show cause why his complaint should not be dismissed for failure to state a claim. ECF No. 10. Plaintiff filed an amended complaint as ordered (ECF No. 11); however, the amended complaint suffers from the same deficiencies.

BACKGROUND

On March 30, 2011, Plaintiff was granted leave to proceed *in forma pauperis* and his civil rights complaint was docketed. ECF Nos. 8 and 9. In his complaint, Plaintiff appeared to

¹ See <http://www.thegeogroupinc.com/northamerica.asp?fid=105>; <http://www.ice.gov/pi/dro/facilities/tacoma.htm>.

1 allege that deportation officers at the NWDC violated his due process rights by interfering with
2 his ability to obtain the travel documents necessary for him to be removed to his native country.
3 He sought damages for what he claims is his ongoing unlawful detention. Only the Bureau of
4 Immigration and Customs Enforcement (BICE) was named as a Defendant. Upon review, the
5 Court found the complaint to be deficient and directed Plaintiff to show cause why the complaint
6 should not be dismissed or to amend his complaint to state a cause of action under *Bivens*. ECF
7 No. 10. In particular, the Court noted that a *Bivens* claim is not available against a federal
8 agency and that to the extent he seeks to challenge his detention as unlawful, his sole remedy is a
9 writ of habeas corpus. *Id.*, p. 3 (citing *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129
10 L.Ed.2d 383 (1994)).
11

12 In his Amended Complaint, Plaintiff again names BICE as Defendant, and adds Robert
13 Mason (Deportation Officer), Thomas Gills (ICE Supervisor), and De Lapaz (ICE Deportation
14 Officer) as Defendants. ECF No. 11, pp. 2-3. Plaintiff, who is a native of Guinea, claims that he
15 wanted to be deported to France. Although he presented copies of his French passport and
16 certificates of citizenship from France, he claims that travel to France was refused because
17 Robert Mason gave “conflicting” information to the French Consulate, including an alias that
18 Plaintiff had used in the past. Plaintiff alleges that he gave Robert Mason all the necessary
19 papers requested, that it took him over eight months to contact his family to obtain necessary
20 documentation because the NWDC phone protocol is difficult for non-English speaking persons,
21 and now the authenticity of the documents he finally obtained from his family is being
22 questioned. *Id.*, pp. 6-7. Plaintiff claims that he has been detained over 50 months because of
23 Mr. Mason. He also alleges that Mr. Mason lied in a post-order custody review worksheet
24 resulting in Plaintiff’s continued custody. He states that ICE officials did not interview him or
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1 give notice of the review, an opportunity to review the facts or notified of a right to an
 2 administrative appeal. *Id.*, p. 9. Plaintiff claims that Robert Mason has subjected him to
 3 harassment and humiliation. *Id.*, p. 11. He claims that his case has continued for over twenty
 4 five years based on mistakes made by ICE. *Id.*

5 The Court takes notice that Plaintiff is currently challenging his continued detention and
 6 treatment received by Robert Mason and other ICE officials in a Petition for Writ of Habeas
 7 Corpus filed in this Court in Case No. 11-266-MJP-BAT.
 8

9 DISCUSSION

10 The Court “may act on its own initiative to note the inadequacy of a complaint and
 11 dismiss it for failure to state a claim” upon which relief may be granted. *Wong v. Bell*, 642 F.2d
 12 359, 361 (9th Cir. 1981) (citing 5 C. Wright & A. Miller, Federal Practice and Procedure, s 1357
 13 at 593 (1969)); see also *Sparling v. Hoffman Construction Co. Inc.*, 864 F.2d 635, 638 (9th Cir.
 14 1988); *Omar v. Sea-Land Service, Inc.*, 813 F.2d 986, 991 (9th Cir. 1987) (court may *sua sponte*
 15 invoke Fed. R. Civ. P. 12(b)(6) to dismiss deficient complaint); *Crawford v. Bell*, 599 F.2d 890,
 16 893 (9th Cir. 1979). The Court must give a plaintiff both “notice of its intention to dismiss” and
 17 “some opportunity to respond,” however, unless plaintiff “cannot possibly win relief.” *Sparling*,
 18 864 F.2d at 638 (quoting *Wong*, 642 F.2d at 362)).
 19

20 A complaint is legally frivolous when it lacks an arguable basis in law or fact. *Neitzke v.*
 21 *Williams*, 490 U.S. 319, 325 (1989); *Franklin v. Murphy*, 745 F.2d 1221, 1227-28 (9th Cir.
 22 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an
 23 indisputably meritless legal theory or where the factual contentions are clearly baseless. *Neitzke*,
 24 490 U.S. at 327. A complaint or portion thereof, will be dismissed for failure to state a claim
 25 upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right
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1 to relief above the speculative level, on the assumption that all the allegations in the complaint
2 are true.” See *Bell Atlantic, Corp. v. Twombly*, 540 U.S. 544, 127 S.Ct. 1955, 1965
3 (2007)(citations omitted). In other words, failure to present enough facts to state a claim for
4 relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at
5 1974.

6 To state a claim under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct.
7 1999, 29 L.Ed.2d 619 (1971), and its progeny, Plaintiff must allege that (1) a right secured by the
8 Constitution of the United States was violated and (2) the alleged violation was committed by a
9 federal actor. See *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir.1991). 42 U.S.C. § 1983 and
10 *Bivens* actions are identical save for the replacement of a state actor under § 1983 with federal
11 actor under *Bivens*). A *Bivens* claim is not available against a federal agency. *FDIC v. Meyer*,
12 510 U.S. 471, 486, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994).
13

14 As Plaintiff was previously advised, a *Bivens* claim is not available against the BICE. In
15 addition, any claims against individual defendants on the basis that they supervised the
16 deportation investigation is without merit as *respondeat superior* liability does not lie in *Bivens*
17 actions. See *Terrell v. Brewer*, 935 F.2d 1015, 1018 (9th Cir.1991). Government officials may
18 not be held liable for the unconstitutional conduct of their subordinates under a theory of
19 *respondeat superior*. A plaintiff must plead that each Government-official defendant, through
20 the official’s own individual actions, has violated the Constitution. *Ashcroft v. Iqbal*, ---U.S. ---,
21 ---, 129 S.Ct. 1937, 1948, 173 L.Ed.2d 868 (2009) (emphasis added).
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23 More importantly, as Plaintiff is clearly seeking to challenge the lawfulness of his
24 continued detention, his sole remedy is a writ of habeas corpus. *Heck v. Humphrey*, 512 U.S.
25 477, 114 S. Ct. 2364, 129
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1 L.Ed.2d 383 (1994). In *Heck*, the United States Supreme Court held that a plaintiff cannot bring
2 a civil rights action for damages for a wrongful conviction unless that conviction already has
3 been determined to be wrongful. *See id.* at 486-87. A conviction may be determined to be
4 wrongful by, for example, being reversed on appeal or being set aside when a state or federal
5 court issues a writ of habeas corpus. *See id.* The *Heck* rule also prevents a person from bringing
6 an action that - even if it does not directly challenge the conviction - would imply that the
7 conviction was invalid. The practical importance of this rule is that plaintiffs cannot attack their
8 convictions in a civil rights action for damages; the conviction must have been successfully
9 attacked before the civil rights action for damages is filed.
10

11 In his amended complaint, Plaintiff asks the Court to prosecute Robert Mason for human
12 rights violations and demands \$3 million as compensation for his “illegal detention” as “the 4
13 years I have spent here cannot be given back to me.” ECF No. 11, p. 4.
14

15 Plaintiff’s attempt to characterize his complaint as one for human rights violations is to
16 no avail as such a claim would “necessarily imply the invalidity” of his continuing detention.
17 *Heck*, 512 U.S. at 487. In other words, if Plaintiff can show, for example, that Robert Mason has
18 conspired to keep him detained by providing conflicting information to authorities, this would
19 “necessarily imply the invalidity” of his detention.
20

21 Although *Heck* was a civil rights action under 42 U.S.C. § 1983, the rationale and
22 conclusion of *Heck* apply in cases brought under *Bivens* as well as § 1983. *See Martin v. Sias*,
23 88 F.3d 774, 775 (9th Cir. 1996). *Heck* is also not limited to just those who have been convicted
24 or sentenced. *Heck* also applies in the pretrial setting and bars claims which necessarily
25 implicate the validity of pending criminal charges. *See Harvey v. Waldron*, 210 F.3d 1008, 1014
26 (9th Cir.2000). A civil claim for damages which necessarily implicates the validity of pending

criminal charges does not accrue until after one has succeeded in the criminal justice realm. Thus, *Heck* bars Plaintiff's claims for damages because they implicate the validity of the ICE investigation and his continued detention. Plaintiff's claims for damages in this action will not accrue under *Heck*, unless or until he prevails in his immigration proceedings or he is granted habeas relief pursuant to 28 U.S.C. § 2241. *See Contreras v. Schiltgen*, 122 F.3d 30, 32-33 (9th Cir. 1997) (until plaintiff successfully overturned state conviction, former Immigration and Naturalization Service was entitled to rely on conviction as basis for custody and eventual deportation), *aff'd on add'l grounds Contreras v. Schiltgen*, 151 F.3d 906 (9th Cir. 1998). In fact, as noted above, Plaintiff is simultaneously pursuing a Petition for Writ of Habeas Corpus in this Court in Case No. 11-266-MJP/BAT.

CONCLUSION

Plaintiff has failed to state a cognizable *Bivens* claim. Therefore, this action should be **DISMISSED WITHOUT PREJUDICE**.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. *Thomas v Arn*, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **June 10, 2011** as noted in the caption.

DATED this 23rd day of May, 2011.


Karen L. Strombom
United States Magistrate Judge